No. 82-5632

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ROBERT BAKER,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE MISSOURI SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

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I.

QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner was deprived of constitutional due process of law by the trial court's failure to give the jury an instruction on felony murder.

2. Whether the evidence was sufficient to support the jury's finding of the aggravating circumstance: "The capital murder was committed against any peace officer, while engaged in the performance of his official duty," on the alleged basis that the jury's finding is not inconsistent with the theory that petitioner did not shoot or intend to shoot Officer Erson.

3. Whether petitioner may raise a constitutional claim in this court which was never presented to the Supreme Court of Missouri or any other state court.

4. Whether, as a matter of constitutional due process of law, a determination that petitioner knew that the victim was a police officer is required; whether there was sufficient evidence for such a finding and whether the imposition of the death penalty herein constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

STATEMENT OF THE CASE

Petitioner Robert Baker was convicted of capital murder, § 565.001, RSMo 1978, and was sentenced to death for the fatal shooting of an undercover police officer. Since the evidence of petitioner's guilt is fully set out in the opinion of the Missouri Supreme Court affirming his conviction and sentence, State v. Baker, 636 S.W.2d 902 (Mo. banc, 1982) (Petitioner's Appendix A), that evidence will not be stated here except as relevant to petitioner's constitutional claims.

The evidence bearing upon petitioner's present contention is as follows: Gregory Erson was a police Officer in the City of St. Louis (Trial Transcript--hereinafter Tr--at 262) on assignment at the "Stroll," a high crime area in St. Louis, as an undercover agent on the prostitution detail (Tr. 262). He drove an unmarked automobile and wore blue jeans and a softball shirt (Tr. 263). Erson had his miniature police radio on the front seat of the automobile (Tr. 275). Detective Erson wore his service weapon in an ankle holster (Tr. 280-281). Petitioner was observed in the "Stroll" on that evening (Tr. 323-325, 332). A resident of the Stroll, heard an argument and gunshot between 11:30 and 12:00 p.m. on the night of June 19, 1980 (Tr. 290). Two men were observed running from the scene, one running with a limp (Tr. 291). A ballistics expert testified that Detective Erson's gun fired the bullet which killed Detective Erson (Tr. 386-388, 369-371). Appellant's taped statement, admitting his participation in the murder, was played for the jury (Tr. 443). The jury found appellant guilty of capital murder (Legal File--hereinafter L.F.--73). No evidence was introduced at the bifurcated punishment stage of trial (Tr. 634-635). The jury returned a sentence of death (L.F. 74).

SUMMARY OF ARGUMENT

Petitioner argues that he was entitled to an instruction on felony first degree murder under Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). Petitioner received instructions on lesser offenses, but Missouri law explicitly states that murder in the first degree is not a lesser included offense of capital murder the offense charged. Beck does not require that a particular lesser offense be instructed upon nor does it define what a lesser included offense is. This petitioner was given the proper instructions under Missouri law.

Petitioner next contends that the jury's finding of the aggravating circumstances that a police officer was killed in the line of duty was not inconsistent with a finding that petitioner himself did not shoot the officer and that the conviction of petitioner violates the holding of Enmund v. Florida, __ U.S. __, 102 S.Ct. 3368 (1982). This theory is advanced for the very first time in this certiorari petition, having not been raised in any Missouri Court, and thus is not reviewable in this Court. In any event, the jury was required to find that petitioner intended his actions, either in killing the victim or in aiding in the killing. The instant petition, unlike Enmund, supra, involves a capital murder and not a felony murder.

Finally, petitioner contends that the evidence was insufficient to support the jury's finding of the aggravating circumstance in that the evidence did not establish that petitioner knew his victim was a police officer. Evidence of a visible miniature radio and that the victim was shot with his own gun, taken from his ankle holster supports a rational trier of facts conclusion beyond a reasonable doubt that petitioner knew his victim was a police officer.

ARGUMENT

I.

Petitioner's first contention in his certiorari petition is that he was entitled to an instruction on felony murder as a lesser included offense of capital murder. Petitioner did receive jury instructions, in addition to capital murder, of murder in the second degree (Instruction No. 8, L.F. 57) and manslaughter (Instruction No. 9, L.F. 58), both carrying penalties other than the death penalty.

Under Missouri law felony-murder (first degree murder) is not a lesser included of capital murder. Missouri has recognized "that an offense can be a lesser included offense of another either: (1) when its elements are necessarily included therein, or (2) when by statute it is specifically denominated as a lesser degree of the offense charged. State v. Wilkerson, 616 S.W.2d 829, 833 (Mo. banc 1981)." State v. Baker, supra at 704. The statutory elements test requires that the lesser offense be established by proof of the same or less than all the facts required to prove the greater offense. State v. Smith, 592 S.W.2d 165, 166 (Mo. banc 1979); State v. Amsden, 299 S.W.2d 498, 504 (Mo. 1957). Felony murder does not satisfy the elements test inasmuch as it requires separate proof of an element not required in proving capital murder, namely proof of the commission of a felony. Neither is felony murder "specifically denominated by statutes as a lesser degree." State v. Baker, supra at 404; §§ 565.001, 565.003, RSMo 1978.

Beck v. Alabama, 447 U.S. 625, 637, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) stands for the proposition that the submission of lesser offenses may not be categorically denied, but it does not hold that any particular lesser offense must be instructed upon. Nor does Beck v. Alabama, define what a lesser offense is. A majority of other jurisdictions follow the statutory element test. 4 Wharton's Criminal Procedure

§ 545 (12th ed. 1976). E.g., State v. Reynolds, 250 N.W.2d 434, 439 (Iowa 1977); State v. Leeman, 291 A.2d 709, 710 (Me. 1972); People v. Jones, 45 Mich. App. 373, 206 N.W.2d 453, 454-455 (1973); State v. Butler, 44 Ohio App.2d 177, 337 N.E.2d 633, 638 (1974); Randolph v. State, 83 Wis.2d 630, 266 N.W.2d 334, 339-340 (1978). See also Annot., 11 A.L.R.Fed. 173, indicating that this approach is used in the federal system under Federal Rules of Criminal Procedure, Rule 31(c), 18 U.S.C.A.

There is considerable variation among the jurisdictions as to what constitutes a "lesser offense." A number of states (and several federal judicial circuits) require that the crime be a lesser included offense, but define that term more broadly than does Missouri: rather than requiring that the statutory elements of the lesser crime be included in the greater, they simply specify that the lesser offense must be supported by the evidence. See, e.g., United States v. Johnson, 637 F.2d 1224, 1232-1241 (9th Cir. 1980); United States v. Pino, 606 F.2d 908, 914-917 (10th Cir. 1979); People v. Jones, 395 Mich. 379, 236 N.W.2d 461, 464-465 (1975); State v. Boyenger, 95 Idaho 396, 509 P.2d 1317, 1321-1322 (1973); Matthews v. State, 310 A.2d 645, 646 (Del. 1973); cf. State v. Manning, 612 S.W.2d 823, 827-828 (Mo.App., E.D. 1981). Other states, like Missouri, define the term "lesser included offense" more narrowly but also permit instructions on lesser "degrees" of offenses. See, e.g., State v. Seelke, 221 Kan. 672, 561 P.2d 869, 872 (1977); State v. Terry, 336 So.2d 65, 66-68 (Fla. 1976); Day v. State, 532 S.W.2d 302, 312 (Tex.Crim.App. 1975). In short, there is no set standard as to what constitutes a lesser offense for instructional purposes. Petitioner cites no authority and respondent can think of none which holds the "elements test" to be unconstitutional.

As the Missouri Supreme Court stated in its opinion in State v. Baker, supra, at 905 noted:

"Having ruled that first degree murder is not a lesser included offense of capital murder, we must then determine the constitutional viability of the resulting instructional scheme in light of Beck v. Alabama, 447 U.S. 625 (1980). Beck requires that the trier of fact in a capital murder case be allowed to consider lesser included offenses supported by the evidence. CF. Hopper v. Evans, ___ U.S. ___, (No. 80-1714, May 24, 1982). The Beck requirement prevents the jury from being in an 'all or nothing' situation in which it might err on the side of conviction. Although Beck is not precisely on point, due to the fact that first degree murder is not a lesser included offense of capital murder in Missouri, examination of the elements of the homicides, notably the mental states, illustrates that it is second degree murder, not first degree murder, which would sufficiently test a jury's belief of the crucial facts for a conviction of capital murder. See § 565.001, RSMo 1978; § 565.003, RSMo 1978; § 565.004, RSMo 1978; State v. Franco, 544 S.W.2d 533, 535 (Mo. banc 1976), cert. denied 431 U.S. 957 (1976). Therefore, omitting first degree murder from the instructional scheme, where only capital murder is charged, does not run afoul of Beck."

Thus there is no legitimate basis for the issuance of a writ of certiorari on this claim.

II.

Petitioner contends in Points II and III of his Argument that the jury's verdict assessing the death penalty "is not inconsistent with a finding that petitioner did not himself shoot the victim." From this assertion, he seeks to invoke the doctrine of Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368 (1982), wherein this Court held that persons convicted as aiders and abetters in a felony-murder could not be sentenced to death absent a jury finding of an intent or attempt to kill. Although petitioner does not so state, his argument is a mere replication of the dissent by Justices Brennan and Marshall from the denial of certiorari in Newlon v. Missouri, No. 81-6660 (October 14, 1982).

The principal difficulty with this claim is that it was never presented to any state trial or appellate court, but rather is raised for the very first time in this certiorari petition[1]. As this Court has noted:

> "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgement of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system: (citations omitted). Webb v. Webb, 451 U.S. 493, 496-497 (1981).

See also Sandstrom v. Montana, 442 U.S. 510, 527 (1979). Since neither the Supreme Court of Missouri nor any other state court has had the opportunity to pass upon petitioner's current theory, that theory is not properly reviewable here.

In any event, petitioner's theory is without merit. Unlike the defendant in Enmund, petitioner was not convicted on a felony-

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[1] Although this could be demonstrated by production of the state court records and briefs, it is also manifest from the fact that the present theory was not addressed in the opinion of the Missouri Supreme Court. Where "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary" (citations omitted). Street v. New York, 394 U.S. 576, 582 (1969).

murder theory; indeed, as this Court points out, felony-murder is not a capital offense under Missouri law. Id., 102 S.Ct. at 3373 (n. 6). Rather, the verdict directing instruction (Instruction No. 7, L.F. 56) required the jury to find that petitioner had the intent to kill Detective Erson or that he, with the purpose of promoting Detective Erson's death aided in committing the offense. This clearly satisfies the requirement of Enmund. Id., 102 S.Ct. at 3376-3379.

III.

Finally, petitioner contends in his Points III and IV that the evidence was insufficient to support the jury's finding that the aggravating circumstance, that "the capital murder was committed against any peace officer . . .while engaged in the performance of his official duty." § 565.012.2(8), RSMo 1978, was satisfied in the instant petition; his theory is that he could not have known that Erson was a police officer. The Missouri Supreme Court held:

> "Appellant's assertion is without merit. There was a police radio on the front seat of the car. Ballistics evidence showed that Erson was shot with the revolver issued to him by the police department. The evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that appellant knew Erson was a police officer. Jackson v. Virginia, 443 U.S. 307 (1979)."

State v. Baker, supra at 907. Respondent submits that the standard set out in Jackson v. Virginia, supra, is the appropriate standard to consider sufficiency of the evidence questions. A reasonable inference exists, such that a rational trier of fact could find beyond a reasonable doubt, that petitioner, having observed the police radio which alerted the first officer on the scene to the fact that Erson was a police officer (Tr. 275), and discovering Erson's weapon housed in an ankle holster, knew his victim was a policeman. A witness testified that she heard an argument before the gunshot (Tr. 290) and a jury could have concluded that petitioner, during that argument, inexorably ascertained that his victim was an undercover police officer. Indeed, the fatal wound was inflicted by a bullet from the victim's own gun. Therefore, no legitimate basis for the issuance of a writ of certiorari exists on this claim.

CONCLUSION

In view of the foregoing, the respondent respectfully submits that petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

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